13

No. 1599

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. J. GODDARD, as General Receiver of the Property of the DUWAMISH MILL COMPANY, a Corporation,

Plaintiff in Error,

vs.

CASUALTY COMPANY OF AMERICA, a Corporation,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division

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STATEMENT.

This writ of error is prosecuted for the review of a decision of the United States Circuit Court for the Western District of Washington, Northern Division, sustaining a demurrer to the amended complaint in this action and from a judgment duly made and entered thereupon. The action was brought by the plaintiff in error as general receiver of the property of the Duwamish Mill Company, to collect upon an employee's indemnity policy issued to that Company by the defendant in error.

The complaint, after reciting the usual formal matters, the regular appointment of the receiver, his subsequent qualification by filing the required bond and oath, the issuance of the policy and its operation at the time of the injuries sued upon, further alleges in effect that—

(a) During the life of the policy one Charles Baker was injured while in the employ of the assured, the Duwamish Mill Co.

(b) That thereafter he brought suit against the assured for damages predicated upon his injuries, which resulted in a verdict and judgment of $6,000 in his favor and against the assured in the trial court, and was subsequently affirmed on appeal by the court of last resort, the Supreme Court of the State of Washington, and that final judgment was made and entered on the 8th day of October, 1906.

(c) That the defendant in error took sole and exclusive charge and control of the defense of said suit throughout.

(d) That on the 25th day of October, 1907, the plaintiff herein, as general receiver of the Duwamish Mill Company, under the instructions and directions of the Superior Court of the County of King, issued to the said Charles A. Baker, his interest bearing receiver's certificate in the sum of $6,764.06 in payment and satisfaction of said judgment as affirmed, and that said certificate was accepted and received

in payment and satisfaction of the judgment and the judgment was satisfied of record.

That said receiver's certificate constitutes a first lien upon all the property of every description of the Duwamish Mill Company and upon the earnings thereof, after deducting the operating expenses of the receivership.

(e) The complaint also recited in full all the provisions of the policy material to this action, among which are the following:

"The Company shall not be liable under this policy unless an action to enforce such liability be brought within sixty days from the date of the entry of a final judgment against the Assured, after a trial of the issues on the merits, in a suit duly instituted within the period limited by the Statute of Limitations, awarding damages on account of a casualty covered hereby; and then only provided that such action against the Company be brought by the Assured personally, for damages sustained by the Assured in paying and satisfying such final judgment. This clause shall not in any way limit, restrict or abridge the Company's defenses to any such action."

To this complaint the defendant in error interposed a demurrer upon the grounds: (1) That it does not state facts sufficient to constitute a cause of action; (2) That the action was not commenced within the time limited by law and by the contract sued on; (3) That the plaintiff is without legal right to institute and maintain a cause of action against the defendant upon the matters set forth in the complaint; (4) That it appears upon the fact of the

amended complaint that the plaintiff has not brought the action within the time limited within the contract upon which he sued.

This demurrer was sustained by the Court and the action dismissed.

ASSIGNMENT OF ERRORS.

The Court below erred in sustaining the demurrer interposed to plaintiff's amended complaint in the following particulars:

(a) By holding and deciding that the facts stated in said complaint were not sufficient to constitute a cause of action.

(b) By holding and deciding that the said action was not commenced within the time limited by law and by the contract sued upon.

(c) By holding and deciding that the plaintiff has no legal right to institute and maintain a cause of action against the defendant upon the matters set forth in his amended complaint.

(d) By holding and deciding that it appears upon the face of the amended complaint that the said plaintiff has not brought his action within the time limited by the contract upon which he sues and is therefore barred.

2.

That the said Court erred in rendering judgment against the plaintiff in said cause upon the pleadings in said cause and that said judgment is contrary to law and the facts as stated in pleading.

ARGUMENT.

The demurrer involves an interpretation of the provisions above set out and presents but two questions—

1. DOES THE RECEIVER'S CERTIFICATE AND ITS ACCEPTANCE IN PAYMENT AND SATISFACTION OF THE JUDGMENT CONSTITUTE *PAYMENT AND SATISFACTION* WITHIN THE CONTEMPLATION OF THE POLICY?

2. IS THE ACTION BARRED BY THE LAPSE OF TIME?

We shall discuss these questions in their order. In view of the recent authorities, plaintiff in error does not contend that payment and satisfaction is not a pre-requisite to his right of action, but on the contrary expressly recognizes that it is an essential, and bases his claim entirely upon the ground that in issuing the certificate he complied with the policy requirements at least so far as the sufficiency of his compliance can be determined upon demurrer. In construing these provisions it will be remembered that, as was said by Mr. Justice Harlan, in *Royal Insurance Co. vs. Martin,* 192 U. S. 162:

"As the words of the policy are those of the Company, they should be taken most strongly against it, and the interpretation should be adopted which is most favorable to the insured, if such interpretation be not inconsistent with the words used."

London & Lancaster & Globe Ins. Co. vs. Kenney, 180 U. S. 132;

Texas & P. R. Co. vs. Reiss, 183 U. S. 621.

With this rule in mind it is evident that the

paragraph in question cannot be taken to bind the insured to a payment in money, as had the defendant expected to so limit the words "payment and satisfaction" it was perfectly competent for it to have done so by adding the words "in cash" or "in money." This would have restricted the clause to a money payment, but in the absence of such qualifying words the terms "Payment and satisfaction" should be construed according to their common meaning. The omission clearly indicates that all the policy contemplated and required was a satisfaction of the judgment procured, and payment and satisfaction, whether made in cash or by note or by a receiver's certificate, or any other consideration of value, would suffice.

It is clear that all the defendant desired was to secure itself against suit brought by the judgment creditor, and it could have no interest in the manner in which this satisfaction is procured. There would be no question of the defendant's liability had the plaintiff first borrowed the money upon his certificate and satisfied the judgment from the proceeds. If, as the defendant insists, the policy is one of strict indemnity, the insurer would certainly be liable to the amount of any cash compromise plaintiff had made with his judgment creditor. Had he compromised the judgment for $100.00 in cash, then the Company would be liable for that sum at least. Upon

this theory it follows that the Company must then be liable for the value of the receiver's certificate, for it is the thing of value upon which the compromise was made. It is certainly worth something, and its actual worth is the amount of plaintiff's loss, the very loss against which the policy indemnifies it. What that loss may be and to what extent plaintiff has been damaged is a question of fact to be proved at the trial upon the merits, and cannot be determined upon demurrer. In ruling upon this point upon demurrer the Court could only determine whether or not the certificate constituted payment. By this we do not mean whether or not it was worth its face, but whether it was any payment at all, and in deciding this question he was bound to construe the word according to its common usage and to give the insured the benefit of any doubt or inconsistency. Webster defines the word as—

(1) "The act of paying or giving compensation; discharge of a debt or obligation.

(2) That which is paid; or thing given in discharge of a debt or an obligation, or in fulfillment of a promise, reward, recompense, requital, return."

In Vol. 18 of Am. & Eng. Enc. of Law, at page 146, it is said: "To pay is defined by lexicographers to discharge a debt, to deliver a creditor the value of a debt, either in money or in goods, to his acceptance, by which the debt is discharged."

And it is almost uniformly held that where a promissory note or other thing of value is accepted in satisfaction of a debt, that it will be taken by the court as the equivalent of a money payment, provided the parties so agree.

This proposition is so elementary that we refrain from submitting any authorities.

Considering the importance of the proposition involved there is a surprising lack of authorities, and at this time we have been able to find but two authorities strictly upon the proposition. One is the case of *Kennedy vs. Fidelity etc. Co.,* 110 N. W., page 97 (Minn.). This case arose upon a policy identical with the one sued upon, and upon precisely the same state of facts except that the satisfaction of the judgment was made by promissory note instead of receiver's certificate. The Court in holding that the requirements of the policy were satisfied by such a payment, said:

"We accept the views of appellant that this is a contract of indemnity, and not one of insurance, to the extent of $5,000. In this respect the policy differs materially from the one considered in *Anoka Lumber Co. vs. Fidelity & Casualty Co.,* 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689. The contract contemplates that an actual loss shall be sustained and paid before the Company becomes liable, and appellant submits that by the fair and reasonable meaning of the language the assured cannot accomplish payment or satisfaction of the judgment in any other way than by actually parting with the cash. It is admitted that the debt and judgment was paid and satisfied by the

execution of the promissory notes, if given in good faith. *Bausman vs. Credit Guarantee Co.,* 47 Minn. 377, 50 N. W. 496. But the whole argument of appellant rests upon the claim that the mere giving of the notes did not amount to a loss actually sustained for the reason that the maker of the notes and the guarantor might never be called upon to make payment, might become insolvent, that there is no certainty they will ever be paid, and, if not paid, there is no loss actually sustained. This means that the party assured, no matter what his financial condition might be, would be compelled to raise the actual cash within 60 days and pay it to the judgment creditor, or be foreclosed from enforcing the indemnity against the company. If the position is sound, the money could not be raised by borrowing at a bank, or at any other place, upon promissory notes secured either by a signer or by property because, before the notes became due, the property might become worthless, deteriorate in value, or the parties might become insolvent, and no actual payment ever be made; hence no loss. Fairly construed, the language means simply that the judgment must be paid and satisfied within 60 days from the date of its entry, and when such judgment is paid or satisfied, the loss is actually sustained. Of what consequence is it to the company whether respondent has on hand immediate cash to pay the judgment, or whether the judgment debtor is compelled to borrow that amount on the most favorable terms, or whether he makes the payment and secures the satisfaction by the execution of promissory notes running direct to the judgment creditor? Logically there is no difference in the method, and in either case it amounts to a payment and satisfaction of the judgment.

If the assured accomplished the satisfaction and payment of the judgment by execution and delivering the promissory notes above described, the good faith of that transaction was hardly open to question, even though it gave the assured the advantage of collecting from appellant company the amount of insurance

before the notes came due. So far as the record shows, the assured paid the judgment in good commercial paper, and there is nothing upon the face of the transaction to indicate that the arrangement was made for a fraudulent purpose.''

In a note to *Kennedy vs. Fidelity etc. Co., supra,* Vol. 9, L. R. A., new series, the editor, in discussing whether or not giving a note constitutes loss or damage within the contract of indemnity, says:

''The conclusion reached in the above case, that the giving of a note amounts to a loss actually sustained by the person indemnified within the meaning of a contract of indemnity, where the note is accepted by the creditor as actual payment and satisfaction of the original debt, has the sanction of all the authorities.

This principle was applied in *Bausman vs. Credit Guarantee Co.,* 47 Minn. 377, 50 N. W. 496, to a contract to indemnify a party as the indorser of a promissory note which the maker failed to pay, and which the indorses paid by executing his individual note for the amount thereof.

So, in *Lee vs. Clark,* 1 Hill 56, the same result was reached in the matter of a bond condition that the obligees thereto should be saved harmless, the court saying that a negotiable note so given and accepted was equivalent to the payment of cash, and that the rule would 'probably' be the same as to a note not negotiable.

And the same result was reached in the following cases with reference to bonds given to indemnify

and save harmless sheriffs in levying upon property: *Wilson vs. Smith,* 23 Iowa, 252; *Gardner vs. Cooper,* 9 Kan. App. 587, 58 Pac. 230, 60 Pac. 540; *Pasewalk vs. Bollman,* 29 Neb. 519, 26 Am. St. Rep. 399, 45 N. W. 780.

On the same principle it was held in *Glannagan vs. Forest,* 94 Ga. 685, 21 S. E. 712, that a mortgage made by a principal in a promissory note to his surety, to indemnify the latter against loss on account of his suretyship, might be foreclosed after maturity of the note and payment thereof b ythe surety, though the payment was made by the surety executing his individual note, which was accepted by the creditor in full payment of the original note."

The case of *Kennedy & etc. Co.* was cited and approved by the Supreme Court of the State of Washington in every particular in an opinion rendered by C. J. Hadley on July 22, 1908, in the case of *Seattle & San Francisco Railway & Navigation Co. vs. Maryland Casualty Co.* In this case, which involved the interpretation of a provision identical with the one now before the court, it was said:

"The argument is made that there is no loss within the meaning of the above until cash has been actually paid in satisfaction of the judgment. The conveyance of property in satisfaction of the judgment would certainly establish a loss; at least to the extent of its value. The execution of a note in exchange for satisfaction is in legal effect equivalent to the exchange of property therefor. It confers a right

to invoke legal process to seize and levy upon property in value equal to the amount of the note. This precise question under a policy identical with this one was determined adversely to appellant's contention in *Kennedy v. Fidelity & Casualty Co.,* 100 Minn. 1, 110 N. W. 97, 117 Am. St. 658. We quote the following pertinent language from the opinion in that case,"

That the insolvency of the judgment creditor is no bar to this action was definitely decided in the above case where the court said:

"Appellant insists that the maker of the note may be insolvent or that the note may be compromised or settled for a sum less than the indemnity liability in the policy. These matters are held to be immaterial in some of the cases cited. We therefore hold that, within just principles and by eminent authority, the execution and acceptance of respondent's note in satisfaction of the judgment established a loss, and that this action may be maintained upon the provisions of the policy indemnifying against loss."

The last proposition was also passed upon by the Supreme Court of the United States on March 7, 1908, in the case of *Allamania Fire Insurance Co. v. Firemen's Insurance Co.* This case arose upon a contract of reinsurance. The policy of reinsurance contained a provision limiting the liability of the reinsurer to an amount equal to a ratable proportion of the sum *"actually paid"* by the assured or reinsured.

The court in holding that the reinsurer was liable whether the amount was actually paid or not said at page 546 of the Advanced Sheets:

"The insolvency of the original insurer is no defense, in whole or in part, to a suit against the rein-

surer. It is claimed on the part of the defendant that the condition in its policy is an exception to this position of the law. . . . The condition in that policy that, 'in case of loss the company shall pay pro rata at and in the same time and manner as the reinsured,' cannot mean that, in case of the insolvency of the Fulton company, the defendant shall only be obliged to pay the pro rata of the dividends of the assets of said company, upon the claim of the first insured. It cannot have such application. The condition means that the defendant shall pay at and in the same time and manner as the reinsured company shall pay or be bound to pay according to its policy, and that the defendant shall have all the advantages of the time and manner of payment specified in the policy of the Fulton company, otherwise the defendant's policy would not be the contract of indemnity intended, and endless litigation might ensue."

The policy in suit being a Washington contract, should be construed according to the law as announced by the Supreme Court of this state, and therefore the interpretation placed upon the policy in *Seattle etc. Ry. Co. v. Maryland Casualty Co.* is conclusive of this action.

IS THE ACTION BARRED BY LAPSE OF TIME BECAUSE OF THE PROVISION REQUIRING THAT SUIT UPON THE POLICY BE BROUGHT WITHIN 60 DAYS FROM THE ENTRY OF FINAL JUDGMENT?

This provision provides: "That an action to enforce such liability be brought within 60 days from the date of the entry of a final judgment against the assured. * * * * then only provided that such action against the Company be brought by the assured personally for damages sustained by the assured in paying and satisfying such final judgment."

These provisions are inconsistent, and attempt to prescribe two distinct limitations, first, that suit be brought within 60 days, second, that there can be no suit until the judgment is paid. In view of the latter, it is manifest that it would have been a vain and useless thing for the assured to have begun suit within 60 days and before paying the judgment, as the Company's liability did not accrue until after payment.

To reconcile the provisions it will be necessary to read into the policy words which it does not contain, and to hold that it requires that payment must also be made within 60 days. No such stipulation can be found in the policy, and to hold that way would be to work a forfeiture not provided for in the policy or contemplated by the parties when making the contract. On the other hand, to hold that there is an inconsistency and that the assured must benefit thereby would require no strained or artificial interpretation, and only operate to do that which the policy of the law always requires—avoid a forfeiture. As is said by Mr. Cooley in his "Briefs on the Law of Insurance," Vol. 1, page 636: "A policy of insurance must be liberally construed in favor of the assured, as not to defeat, without necessity, his claim to the indemnity which in making the insurance it was his object to secure; and when the words are, without evidence, susceptible of two interpretations, that which sustains his claim and covers the loss must have preference."

McMaster vs. N. Y. Life Ins. Co., 183 U. S. 26.
Thompson vs. Phoenix Ins. Co., 130 U. S. 287.
First Nat'l Bk. vs. Hart. Fire Ins. Co., 95 U. S. 673.

As was said by the Circuit Court of Appeals for the Second Circuit, 95 Fed. 106:

"The defense that the suit was not brought within the time limited by the policy is founded upon a provision 'that all claims under this policy shall be void, unless prosecuted by suit at law within twelve months after the date of the loss, any statute of limitation to the contrary notwithstanding.' The policy also contains a provision that the company shall not be liable for any loss or damage, 'unless the liability of the said steam tug for such loss or damage is determined by a suit at law, or otherwise, as this company may elect.' It contains another provision that 'losses shall be payable sixty days after proofs of such loss or damage and of the amount thereof.' It contains no provision requiring the proofs of loss to be presented within any specified period. The condition requiring suit to be brought within one year must, of course, be read with the other conditions, and it is to be so construed, if possible, as to render all of them consistent and harmonious. By one of them no cause of action can arise under the policy until the assured has established, by legal proceedings, the liability of his vessel for the damage caused by the collision. This he might be unable to do within a year, as in the ordinary course of legal proceedings, prosecuted with due promptness and vigor, it is frequently impossible for a party to procure an adjudication in a litigated controversy within that period. Does the policy mean that, in the event he is unable to do so, the assured is to bear the loss and the company is not to be liable at all? It can only be given this meaning that it was devised by the company as a trap for the unwary, for no sane man would understandingly accept such a policy. Common sense and

common decency forbid a construction which would permit the limitation to be operative during the period before the cause of action rises. In *Hay vs. Insurance Co.,* Chief Justice Church, in considering a similar condition, observed that it seemed 'absurd to suppose that the parties intended to fix a limitation of time for bringing an action, so that by compliance with other conditions of the policy the whole time might elapse, and thus result in depriving the party of the right to bring any action.' 77 N. Y. 243. Statutes limiting the time of commencing action never receive such a construction. We have no doubt that the limitation applies to a loss that has been judicially determined, and begins to run fr omthe date of the determination. After the cause of action thus arises, the other condition of the policy becomes operative, and, unless proofs of loss have been waived, an action upon the policy cannot be brought until 60 days after proofs of the amount of loss are served. Then, and not until then, the limitation begins to run. *Steen vs. Insurance Co.,* 89 N. Y. 315; *Spare vs. Insurance Co.,* 17 Fed. 568; *Friezen vs. Insurance Co.,* 30 Fed. 352; *Steel vs. Insurance Co.,* 51 Fed. 715, 2 C. C. A. 463. The present suit was brought before 60 days had expired after service of the proofs of loss, and the proofs were served within a year from the date of the final decree in the proceeding to limit liability."

It is a general principle that forfeitures are not favored in law, and no where is this more applicable than in the construction of insurance contracts.

> *Palatine Ins. Co. vs. Ewing,* 96 Fed. 111, C. C. A., 236.

A construction of a policy resulting in a forfeiture will not be adopted except to give effect to the obvious intention of the parties.

> *Phoenix Ins. Co. of Brooklyn vs. Holcombe,* 57 Neb. 622, 78 N. W. 300.

Hanover Fire Ins. Co. vs. Dole, 50 N. E. 722.

Logsdon vs. Supreme Lodge of Frat. Union of Am., 34 Wash. 666.

The limitation runs from the time when the loss becomes due and payable, and the right to sue accrues, and not from the time when the loss occurs.

Friezen vs. Allemania Fire Ins. Co., 30 Fed. 352.

In this case the right to sue did not accrue until after payment and consequently the 60 day limitation will run from that time.

Spore vs. Home Mut. Ins. Co., 17 Fed. 568.

Steel vs. Phoenix Ins. Co., 51 Fed. 715, 2 C. C. A. 463.

Prov. Funds Soc. vs. Howell, 110 Ala. 508, 18 South 311.

Where the terms of the policy are inconsistent they will be ignored and the ordinary statute of limitations is applicable.

Dwelling House Ins. Co. vs. Kans., 48 Pac. 889.

In this case, however, plaintiff in error is doubly fortified in his contention that the action has been brought within the time limited by the policy, as the appointment of a receiver raises and suspends that limitation.

Claude vs. Lehman, 65 Ill. App. 238.

Jackson vs. Fidelity Cas. Co., 75 Fed. 359.

We respectfully submit that the trial court erred

in rendering judgment against the plaintiff in error, and should be reversed.

Respectfully submitted,

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